

Anticipated acquisition by the Coca-Cola Company of full control of Fresh Trading Limited

ME/5978/13

The OFT's decision on reference under section 33(1) given on 1 May 2013. Full text of decision published 20 May 2013

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

**PARTIES**

1. **The Coca-Cola Company** (TCCC) is a global manufacturer of non-alcoholic beverages including a range of carbonated soft drinks (its brands include Coca-Cola, Diet Coke, Sprite, Fanta, Dr Pepper and Schweppes branded products including lemonade and tonic water), still drinks (for example, Oasis, Powerade and Glaceau Vitamin Water) and fruit juices/nectars (for example, Minute Maid and Five Alive). TCCC licenses its products to bottlers, Coca-Cola Enterprises (CCE) in Great Britain, and Coca Cola Hellenic (CCH) in Ireland, including Northern Ireland.
2. **Fresh Trading Limited** (Fresh Trading) is a manufacturer and distributor of the non-alcoholic beverages Innocent (a 100 per cent juice smoothie) and This Water (a fruit juice/nectar). Fresh Trading is currently majority owned by Coca-Cola [ ]. It does not sell or market its products in collaboration with TCCC or any connected firm, [ ]. In 2012 Fresh Trading's UK turnover was £[ ], of which smoothie sales accounted for £[ ].

## TRANSACTION

3. In March 2009 TCCC entered into an investment agreement to acquire a minority shareholding in Fresh Trading.<sup>1</sup> The investment agreement included put and call options, which afforded TCCC opportunities to purchase further shares in Fresh Trading. In May 2010, TCCC exercised its option to increase its overall shareholding in Fresh Trading to 60 per cent.<sup>2</sup> TCCC now intends to exercise the option to take its overall shareholding in Fresh Trading to 100 per cent ('the Transaction').
4. The parties notified the Office of Fair Trading (OFT) on 4 March 2013. The OFT's administrative deadline expires on 1 May 2013.

## JURISDICTION

5. As a result of the Transaction TCCC will increase its control of Fresh Trading from material influence to sole control. Section 26(4) of the Enterprise Act 2002 ('the Act') allows for a new relevant merger situation to be created if the acquiring firm, which is already able to exert the lowest level of control (known as 'material influence') over the target firm, acquires a controlling interest in the target firm.<sup>3</sup> In addition, section 27(3) of the Act stipulates that put or call options are not taken into account when deciding when 'enterprises cease to be distinct' until they are exercised. Given TCCC has notified the OFT that it intends to exercise its option the OFT considers that it is in time to make a decision on reference in this case.
6. The UK turnover of Fresh Trading exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
7. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result

<sup>1</sup> This acquisition was examined by the Office of Fair Trading ('the 2009 Decision'). See Anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited, Case No. ME/4091/09, OFT decision of 26 May 2009.

<sup>2</sup> This acquisition was examined by the Office of Fair Trading and found not to qualify as there was no change of control. See Anticipated acquisition by the Coca-Cola Company of an increased shareholding in Fresh Trading Limited, Case No. ME/4494/10, OFT decision of 11 May 2010.

<sup>3</sup> 'Mergers – Jurisdictional and Procedural Guidance', OFT527, June 2009, paragraph 3.33.

in the creation of a relevant merger situation pursuant to section 23 of the Act.

## **MARKET DEFINITION**

8. Combined, the parties manufacture and supply a large range of soft drinks which are recognised as forming part of the wider non-alcoholic beverage (NAB) sector. TCCC supplies carbonated soft drinks (CSDs) and non-CSDs, where the parties overlap.
9. Fresh Trading also supplies meal options sold under the name 'Veg Pots'. As the merger parties do not overlap in the supply of these, and given that these products face very different buyers and competitive conditions, and have not been the subject of any complaints, they are not considered further in this decision.

### **Product scope**

#### **Juices and smoothies**

10. The parties submitted that they consider the appropriate product market definition as all NABs. This would include mineral water, squash and flavoured teas as well as carbonates and juice based or energy/sports drinks. However, the parties acknowledged that the OFT may wish to examine the Transaction on a narrower basis and suggested the definition of juice beverages, which could be further split into:
  - 100 per cent juice
  - nectars (fruit juice content between 25 and 99 per cent)
  - still drinks (non-carbonated, fruit content between 0 and 24 per cent).
11. Taking into account the parties' products and strengths, the OFT also considered the additional product market definitions of smoothies<sup>4</sup> (most of which are part of 100 per cent juice) and enhanced waters.

<sup>4</sup> These definitions were also used in the 2009 Decision. See also Anticipated acquisition by A.G. Barr plc of Britvic plc, Case No. ME/5801/12, OFT decision of 13 February 2013

12. From the demand side, there was a mixed response to these market definitions. Some third parties agreed that these were sensible for delineating products, but noted that they cannot be used to uniquely identify products. For example, This Water can be sold as a nectar, or a still drink, and can also be considered as an enhanced water.
13. Some third parties suggested that these criteria were not clear to consumers who may switch between nectars and juices depending on the consistency of the fruit and whether the product needs to be diluted to be palatable. Some suggested other measures such as 'lemonade based', 'light fruit based drinks' or 'other juice drinks', on the basis that some categories such as enhanced water were only being developed because of high advertising spend by the parties. Generally, third parties stated that consumers are aware of differences between chilled and ambient drinks, particularly for take-home products, and noted that most Fresh Trading drinks are chilled while CCE products are all ambient. In any event, it was not clear that considering these alternatives would materially change the market shares detailed below. Third parties generally agreed with using the data on these categories for illustrating the prominence of the merging parties in similar drinks.
14. Separate data has been gathered on smoothies because of Fresh Trading's strength in this area. Over half the customers that were significant purchasers of smoothies considered that these were a separate market which was not fully constrained by other juice products in response to a SSNIP.<sup>5</sup> Retailers stated that they would look to stock all the product categories that consumers would expect and would not switch purchases away from smoothies unless consumers' preferences changed. It is also noted that there has been significant interaction between smoothies and 100 per cent juice, as shown by the effect on smoothie sales during periods of (often significant) promotion on other juice products including the expansion of Innocent into juice. The third party evidence suggests smoothies are considered sufficiently differentiated from juices in the eyes of consumers, that on a cautious basis, they may form a separate market.
15. As to whether enhanced water constitutes its own product market, the OFT took into account any comments on the categorisation of products as

<sup>5</sup> Small but Significant Non-Transitory Increase in Price, which is the test conducted to define a market.

enhanced water. However, no third parties felt that this was a distinct product category and they had different views as to which products competed with brands given this label.

16. The OFT has also examined the issue of branding and whether it is necessary to separate a relevant product market for branded drinks and own label drinks. It found that major retailers offered own brand options in all product categories. All such respondents said that the private labels that they provided were close alternatives to the parties in the juice and fruit drinks product segments. These products were considered to have similar quality levels and no particular barriers to winning customers.
17. Several customers named private label products as the closest or second closest alternative to the branded products of the parties and provided few branded alternatives in store (although other suppliers were considered to be available). Smaller customers of the parties were not able to provide private-label products of their own, but some of these were able to buy private labels from wholesalers. However, as no concerns were expressed by third parties in these product segments the OFT has not found it necessary to conclude on this.
18. None of the analysis in this case was materially affected by the specific distribution channel. The different channels purchase in similar ways, but brand strength can vary across these. The analysis has focussed on where the brands are strongest (which for Innocent is the major national retailers) with any differences in other channels noted where relevant.
19. The OFT has not found it necessary to conclude on the precise market definition in this case. On a cautious basis it has looked at narrow measures such as smoothies and nectars but also considered wider competition across the soft drinks portfolio, taking into account TCCC's strength in CSDs and Innocent's strength in juices.<sup>6</sup> For smoothies, the OFT has examined the Transaction, wherever it could, on the narrow basis that smoothies (that are always sold chilled, and whether branded or own-label) form their own product market separate from other fruit-based beverages. However, the OFT has also considered a wider product market

<sup>6</sup> This is consistent with the OFT's approach in *Anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited*, ME/4091/09, 26 May 2009.

definition which includes smoothies and chilled 100 per cent fruit juices together (again, on both branded and branded plus own label bases).

20. Finally, when considering conglomerate theories of harm the OFT has assessed TCCC's position in the supply of CSDs separately from other drink types, although the OFT has not found it necessary to conclude on this for the purpose of market definition. This is consistent with the OFT's approach in *Barr/Britvic*<sup>7</sup> and the European Commission's approach in some instances.<sup>8</sup>

### **Geographic scope**

21. The parties submitted that it was not necessary to define the geographic market, but noted that the OFT has previously found that the relevant geographic market for commercial beverages is national in scope.<sup>9</sup>
22. Third parties' reactions were mixed, with some saying that brands like Coca-Cola and Innocent are sold internationally, so the market is wider than the UK. Others suggested that Northern Ireland should be treated separately from Great Britain because TCCC has a different bottler and different marketing policies in place. The strength of different brands was also felt to vary in Northern Ireland, both for competitors and the parties' brands. For example, CCH sells Fruice in Northern Ireland but CCE does not provide any similar offering in Great Britain.
23. However, the competition assessment in this case does not depend on such segmentation. The OFT therefore has not found it necessary to conclude on the geographic market and has examined the Transaction on the basis of the UK for all the product categories discussed in this decision, noting differences and area-specific issues raised by customers between Great Britain and Northern Ireland where relevant.

<sup>7</sup> *Anticipated acquisition by A.G. Barr plc of Britvic plc*, ME/5801/12, 13 February 2013.

<sup>8</sup> M.5632 *Pepsico/Pepsi Americas*; M.5633 *Pepsico/The Pepsi Bottling Group*; COMP. 39/116/B-2 *Coca-Cola Undertakings*.

<sup>9</sup> *Anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited*, ME/4091/09, 26 May 2009.

## HORIZONTAL ISSUES

24. The OFT notes that the parties to the proposed Transaction adopt different approaches to distribution, which is relevant for the OFT's analysis.
25. Fresh Trading contracts directly with major retailers (and some wholesalers). In terms of physical distribution, Fresh Trading uses specialist wholesalers on a sub-contract basis. Smaller retailers (for example, convenience store operators) and those who sell the products for consumption on-premise can source Fresh Trading's products from chilled wholesalers and cash and carry operators.
26. TCCC's products are ambient products and are bottled and distributed by CCE in Great Britain and by CCH in Northern Ireland. TCCC sells its concentrate to CCE or CCH and it is these companies, not TCCC, which contract with retailers (or wholesalers such as cash and carry operators). TCCC receives [ ] in payment for the [ ] it provides.
27. While major retailers (such as the large supermarket operators) and those in the foodservice and restaurant sectors are likely to contract directly with CCE or CCH, smaller retailers (such as convenience store operators who are not part of a major supermarket chain) are likely to acquire their TCCC beverages from specialist wholesalers or cash and carry operators, and not CCE or CCH. These distribution arrangements have been confirmed by third party customers.
28. TCCC does not have any ownership interest in CCE, but has a 23 per cent shareholding in CCH. The parties have submitted that CCE and CCH are listed public companies with independent management. They told the OFT that because [ ], that the Transaction will not give rise to any impacts on customers. They have argued that there is no incentive for TCCC to license Innocent products to CCE/CCH because they do not currently have chilled distribution capability and [ ]. They have also said [ ].
29. However, there is no contractual barrier to TCCC licensing these products to CCE (or CCH), notwithstanding the parties' submission that they would not wish to do so. A Fresh Trading internal document indicates that [ ].

30. The OFT notes that there is nothing to prevent TCCC carrying out this licensing after completion. Further, the OFT notes that both TCCC and the bottlers were previously bound by European Commission commitments,<sup>10</sup> which have now expired. Thus, on a cautious basis, the OFT has examined the Transaction assuming TCCC licenses Fresh Trading to CCE or CCH.<sup>11</sup>
31. In addition to the TCCC products mentioned above, CCE/CCH also distribute Appletiser and – for CCE – Ocean Spray, Monster and Capri-Sun, and – for CCH – Fruice, River Rock, Tanora, and Nestea. Thus the post-merger scenario that the OFT has been examining (on a cautious basis) results in higher market shares than the position of TCCC/Fresh Trading alone.

### **Market shares**

32. Data on shares of supply from Canadian data, split into the categories discussed in paragraph 13, (which are commonly used in the industry) are presented in Table 1. The main overlap between the parties is in Juice beverages where the parties have a [10-20] per cent share (with a [0-10] per cent increment) if private label with a [40-50] per cent share is included. The main competitors in this segment are Pepsi and Britvic. Juice includes 100 per cent juices, nectars, and still drinks.
33. Within this total juice category, CCE provides Oasis, ‘a juice beverage from concentrate’, and Glaceau Vitamin Water that is an enhanced water, but it does not supply smoothies. CCH supplies Fruice from concentrate (a juice beverage) but does not supply smoothies. Fresh Trading supplies This Water as well as Innocent.

<sup>10</sup> See [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39116?39116\\_5\\_6.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39116?39116_5_6.pdf). The commitments provided to the European Commission in the 2005 EU Undertakings expired on 31 December 2010.

<sup>11</sup> For an analogous case, see *Anticipated acquisition by Anheuser-Busch InBev NV/SA of Grupo Modelo SAB de CV*, Case ME/5582/12, OFT decision of 14 November 2012

**Table 1: Market shares for 2011 from Canadian data (per cent)**

Category	100% juice	Nectars	Still drinks	Total Juice
TCCC	[ < 1]	[5-15]	[10-20]	[0-10]
Fresh Trading	[5-15]	[0-5]	[0-5]	[0-10]
Wild	[ < 1]	[ < 1]	[5-15]	[0-5]
Ocean Spray	–	[20-30]	[ < 1]	[0-5]
<b>Merger parties</b>	<b>[5-15]</b>	<b>[25-35]</b>	<b>[20-30]</b>	<b>[10-20]</b>
Pepsi	[15-25]	[ < 1]	[ < 1]	[5-15]
Britvic	[ < 1]	[30-40]	[10-20]	[5-15]
AG Barr	–	–	[0-10]	[0-5]
GSK	–	–	[5-15]	[0-5]
Private label	[50-60]	[5-15]	[15-25]	[40-50]
Others	[10-20]	[20-30]	[20-30]	[15-20]

Note: TCCC, Wild, and Ocean Spray are distributed by CCE

34. In still drinks, the merged firm would have a [20-30] per cent share with a [0-five] per cent increment. Private label accounts for [15-25] per cent. Brands include Fruit Shoot (Britvic), the category leader with [10-20] per cent, and Ribena (GSK) with [five-15] per cent. CCE distributes Wild (Capri-Sun), with [five-15] per cent share. TCCC's strongest brand in the category is Oasis with [five-15] per cent. Glaceau (Vitamin Water) has [0-five] per cent, as does This Water.
35. In nectars, CCE provides 5 Alive, Ocean Spray Cranberry, and CCH sells Fruice. The merged firm and its bottlers would have [25-35] per cent of the segment, with a one per cent increment. Britvic (J20) is the largest competitor with [30-40] per cent. Private label has [five-15] per cent.
36. Within 100 per cent juice, CCE provides Capri Sun, Schweppes Orange, Minute Maid, and CCH supplies Fruice. The share of supply here is [five-15] per cent, with a [ < one] per cent increment. The majority of this segment ([50–60] per cent) is private label and a further [15-25] per cent is attributable to Pepsi (Tropicana, Copella, Naked). However, the OFT notes that this data is based on 2011 figures, and given that Fresh Trading has been expanding rapidly in juice, the combined market share may now be closer to [10-20] per cent but still with a [ < one] per cent increment.
37. The parties have submitted that Innocent has a share of [60-75] per cent<sup>12</sup> of the smoothie segment (most of which are 100 per cent juice). Private

<sup>12</sup> There was some disparity between the two sources for this data, which gave slightly differing shares to Innocent and private label respectively.

label has [10-30] per cent and PepsiCo/Naked, Happy Monkey, and Don Simon each have [0-five] per cent. There is no overlap between the merger parties in the supply of smoothies.

38. Likewise, there is no overlap between the merger parties in the supply of CSDs where CCE has a share of supply of over [40-50] per cent.

### **Unilateral effects**

39. Due to the lack of an overlap in the supply of either smoothies or CSDs the OFT has not found it necessary to examine the Transaction's effect on these with respect to horizontal unilateral effects.
40. Following submissions made by third parties, the OFT has examined the possibility that the merged entity could unilaterally impose prices above the pre-merger level or deteriorate its competitive offering. When products are highly differentiated, unilateral effects concerns are more likely if the brands of the merging parties are close substitutes.<sup>13</sup> Where this is the case, the parties will recapture a significant share of the sales lost in response to a price increase post-merger, making the price rise less costly.
41. In assessing the effects of the Transaction, the OFT has had regard to submissions from third parties which suggest that certain brands may exert a particularly strong competitive constraint on each other. The submissions focused on the overlap in still drinks,<sup>14</sup> where the merged firm has a share of [20-30] per cent, with a [0-five] per cent increment. Each of these product interactions is discussed in turn below.

### **Oasis/This Water**

42. Several third parties suggested that Oasis may compete with This Water when sold in impulse size containers. Both Oasis and This Water were described as 'lighter fruit based drinks'. However, none of the parties which submitted that Oasis and This Water are close competitors within the still drinks segment produced any data to support these claims. One retail customer suggested a theoretical impact but was unable to provide evidence to support this. Another considered that the main competitors to

<sup>13</sup> Merger Assessment Guidelines, paragraph 5.4.6.

<sup>14</sup> This Water may also be considered a nectar and an enhanced water.

This Water were private-label juices and Trop 50 (low sugar Tropicana juice).

43. The parties provided some internal documents which suggested that Oasis and This Water are aimed at different groups of consumers. Specifically, the documents suggested that [ ]. The documents also suggested that Oasis tracked the growth of [ ], and [ ], but did not specifically consider This Water.
44. The parties also provided some Kantar World Panel data which showed that families that tended to purchase Oasis purchased fewer products from Fresh Trading than other shoppers and that when sales of Oasis fell, there was no discernible impact on sales of This Water. The OFT notes that such data can be imperfect for measuring the economic substitution between brands. However, given the lack of concern from customers about this overlap and lack of evidence provided by third parties, these two brands do not appear to be competing closely.

#### Enhanced waters

45. A retail customer suggested that This Water competed both with Oasis and Glaceau Vitamin Water, however they clarified that they did not have concerns about this overlap. The customer submitted that they could withdraw support for Glaceau which was an important brand for CCE, alternatively they could delist the parties' products or switch to rival brands or private label.
46. Another retail customer suggested that the merged firm would have a [60-70] per cent share (with an increment of [0-five] per cent) of enhanced waters due to their purchases of Glaceau, but again were not concerned about this. The main alternatives were considered to be Neuro and Juicy Drench, as well as private-label. Third parties were generally unconvinced that enhanced waters constituted their own product category.

#### Children's single serve fruit drinks

47. In their submission, TCCC noted that [ ]. One third party claimed that Innocent for Kids (smoothies) competes with other children's single serve fruit drinks including CCE's Capri Sun and suggested the merged firm and its bottlers would have a [35-45] per cent share of this segment.

48. The third party produced weekly data showing a weak negative correlation between the parties' brands. However, further testing revealed no evidence of any switching between these brands and also showed that volumes of one may actually have risen in line with the volume increases of the other (positive correlation). No other customers or competitors raised this as a potential issue. The parties pointed out that the products were at very different price points, with Innocent over twice the price per serving compared to Capri-Sun. The parties also provided some Kantar data for this overlap, which showed very little relationship between these products either in terms of joint purchasing in baskets or in terms of customer switching.
49. In all of these potential overlaps, contacts with large numbers of customers have revealed limited evidence of closeness of competition. Increments are low (mostly relating to This Water or secondary brands of Fresh Trading) and in each area there are competing brands available.<sup>15</sup>

## **CONGLOMERATE ISSUES**

50. In light of third party comments in this case, the OFT investigated the likelihood of a substantial lessening of competition arising as a result of the Transaction from conglomerate effects. Conglomerate mergers do not involve a loss of direct competition between parties (which would be examined as a part of unilateral or co-ordinated effects analysis), nor do they involve suppliers that are vertically related in some way (that is, they are active at different stages of a supply chain). Instead, conglomerate mergers involve goods or services which customers do not regard as substitutes.
51. Generally, in competition terms, conglomerate mergers are benign or even efficiency-enhancing. However, in certain circumstances, a conglomerate merger can result in the merged entity foreclosing rivals (through tying and bundling or through 'portfolio effects') and thereby increasing its own market power and profitability.<sup>16</sup> The OFT only regards foreclosure as anti-

<sup>15</sup> Oasis competes against Ribena, Robinsons, and Rubicon and Glaceau competes with Neuro and Juicy Drench. In both categories there are private labels. Many of these brands have products and sub-brands marketed to children, including Robinsons Fruit Shoot.

<sup>16</sup> Merger Assessment Guidelines, paragraph 5.6.5

competitive where it results in a substantial lessening of competition in the foreclosed market(s), not merely where it disadvantages one or a few competitors.

52. Third parties raised three potential means by which TCCC and its bottlers could influence retailers to favour their products over those of rival suppliers due to the strong market position they hold. These were via:
- category captain status and advice to retailers
  - renting chiller cabinets and restrictions on the contents of those chillers, and
  - bundling and tying products or otherwise using the portfolio of products supplied to encourage changes to the purchasing behaviour of retailers.

### **Category Captain**

53. One third party raised the issue of 'category captains'. The OFT has been told that this status is granted to some suppliers by large, national multiple retailers, and allows the 'category captain' to submit planograms showing where they recommend their products should be stocked in the stores. The third party complainant told the OFT that the merger would enhance CCE's position as category captain for certain products.
54. In response, no retailer considered that this could be used to adversely affect rival brands or consumers. Retailers said they were under no obligation to take notice of a submitted planogram, which is merely advice on how best to display and sell products. They stated that they were happy to gather this information from several suppliers and dismiss it if they wanted to take a different approach. Thus even if the Transaction did lead to an expansion in the stores or products that the parties held category captain status for, the OFT does not believe that this would result in harm to competition.

## Chiller cabinets

55. A few third parties raised concerns about access to chiller cabinets. TCCC submitted that CCE has around [ ] chillers in stores throughout Great Britain. CCE confirmed that usually these must be filled with at least [ ] per cent CCE products. However, where the chillers were provided rent-free and there was other chilled capacity in the store, they could be stocked with [ ] per cent CCE products. Some competitors and a retailer raised concerns that the Transaction would give TCCC or CCE greater scope to set adverse terms for access to chillers.
56. One customer suggested that it had been stopped from using CCE chillers for other products. However, it also said that it was able to switch to using its own, unbranded chillers and was already in the process of this pre-merger. In addition other drinks suppliers also provide chillers, albeit in smaller numbers, which may be an alternative for some customers.
57. The parties also submitted that CCE chillers are not suitable for Innocent products because they are turned off at night and Fresh Trading products require constant refrigeration. However, this does not appear to be a major barrier to stocking Innocent products in them, as this [ ] could be adjusted to ensure the chiller works constantly. However, some third parties also noted that the chillers would not be suitable for Innocent products due to the different size of packaging to that for which the chillers are designed, or differing brand characteristics.
58. There has been no suggestion that CCE chillers are used for non-CCE smoothies or 100 per cent juices pre-merger. This suggests that any changes to stocking policy in the chillers in favour of Innocent after the Transaction would be unlikely to restrict competitors to the Innocent brand. The OFT considers that the possibility of rival CSDs being prevented access to CCE chillers is not altered by the Transaction because CCE already has a number of secondary brands which it could place in chillers and which are attractive to these retailers. Based on the OFT's market testing in this case, the majority of customers who rent chillers from CCE do not have much interest in stocking Innocent and did not consider the Transaction would affect them. Finally, the OFT did not receive any evidence to indicate that the Transaction would impact on the chilled capacity available to the parties' rivals. On the basis of the evidence provided, the OFT does not

consider that the Transaction will have an adverse effect on competition through changes in the access terms for chiller cabinets.

### **Tying, bundling and portfolio effects**

59. Third party concerns were raised that, after the Transaction, TCCC and its bottlers and Fresh Trading would be able to leverage their strong position in some segments to tie or bundle these with other TCCC or Fresh Trading products. Third parties suggested a variety of mechanisms through which this tying or bundling may take place, including using their financial strength to expand sales through discounting, gaining exclusivity with certain retailers, or offering over-rider discounts to encourage retailers to take a bundle of products or discouraging the stocking of rival brands.
60. In addition, foreclosure through portfolio effects may arise if customers value variety (rather than only one or a few products). In such situations a conglomerate merger may give the merged firm a product range advantage that can lead to increased market power for its portfolio of products.<sup>17</sup>
61. Until 31 December 2010, TCCC, CCE and CCH were all bound by commitments given to the European Commission in relation to an investigation.<sup>18</sup> These commitments provided, among other things, that TCCC and its bottlers would not use TCCC's strongest brands to sell less popular products, and that 20 per cent of space would be made available to sell other brands in Coca-Cola branded chillers.
62. The OFT notes that the commitments have now expired and therefore that TCCC, CCE and CCH are able to change their contract terms with retailers, although the parties stated that the same principles are now enshrined in internal guidance and manuals. CCE submitted that [ ] discounts and rebates paid to customers were paid on the basis of specific services provided by them, [ ]. CCH said any discounts were in line with its competition compliance programme (with [ ]).
63. The OFT's approach in examining the possibility of such scenarios involves analysing the strength of the following factors and the extent to which the merger materially changes the:

<sup>17</sup> Merger Assessment Guidelines, paragraph 5.6.13.

<sup>18</sup> See Case COMP/39.116, 22 June 2005.

- ability of the merging parties to undertake such strategies (would the merged firm have the ability to harm rivals?)
- incentive of the parties to do so (would the merged firm find it profitable to do so?), and
- the effect of this strategy (would the effect be sufficient to reduce competition, for example, by foreclosing access to shelf-space of significant competitors?).<sup>19</sup>

### **Ability to foreclose**

64. OFT guidance states that in conglomerate mergers the merger may create or strengthen the ability of the merged firm to use its market power in at least one market to reduce rivalry.<sup>20</sup>
65. In this case, TCCC already has a number of strong CSD brands with most customers telling the OFT that Coca-Cola was a 'must stock' brand. TCCC submitted that the potential for Fresh Trading to derive market power from its brands is limited given the strong competition which smoothies face and the significant buyer power of UK grocery retailers. Evidence on this shows that Fresh Trading has a strong position within the supply of smoothies with a share of supply of [60-75] per cent, but when the category is defined as 100 per cent juices, Fresh Trading faces strong competition from PepsiCo's Tropicana brand.
66. When considering the strength of competing brands which may limit the parties' ability to leverage market power into another market post-merger, TCCC submitted that after the Transaction TCCC and Fresh Trading would continue to face strong rivals in all the segments where foreclosure concerns might arise. For example, and as mentioned above, Tropicana is the category leader in chilled 100 per cent fruit juices, J20 (owned by Britvic) is the category leader in nectars, Fruit Shoot (owned by Britvic) is the category leader in still drinks. There are also strong competing brands in ambient juices and waters that will continue to be demanded by consumers and provide strong alternatives for retailers. Furthermore, almost all the large multiple retailers have strong private label brands competing with Innocent and any attempt to use Coca-Cola's brand

<sup>19</sup> Merger Assessment Guidelines, paragraph 5.6.6.

<sup>20</sup> Merger Assessment Guidelines, paragraph 4.1.5.

strength to promote Innocent would require retailers to sacrifice the high margin own-label business for the lower margin branded sales of Innocent (as well as reducing stocks of other branded juices and smoothies such as the strong Tropicana portfolio). Retailers said that they did not consider this likely.

67. Further, the OFT has not received any evidence showing TCCC has used its strong position in CSDs to support its secondary brands in the past. A number of retailers indicated that they were able to delist TCCC products without problems.
68. Some third parties said that the parties could use over-rider discounts to encourage customers to stock their products or stop stocking rival products. One competitor suggested these could account for up to 10 per cent of the parties' sales value, however customers felt they were not important (one large retailer stated they accounted for less than one per cent of sales value) and often these were only given in return for specific services or were implemented in such a way that the post discount price of the products did not change even when volumes changed relative to targets. Customers did not consider that discounts would have any exclusionary effect even if Innocent was included under the TCCC portfolio and no customers provided any examples of TCCC leveraging portfolio power prior to the merger.
69. Given the pre-merger strength of core TCCC CSD brands, it is not clear that the merger materially changes the ability of TCCC to influence retailers.

#### **Incentive to foreclose**

70. The incentive to foreclose depends on whether bundling the portfolio becomes more profit enhancing as a result of the Transaction. This depends on whether the gains from foreclosure in the affected markets outweigh any costs of foreclosure in the markets where bundling is occurring. If a substantial proportion of customers strongly prefer to buy some of the portfolio of products in isolation then sales of these products might fall.
71. Pre-merger both Fresh Trading and TCCC had weaker brands in their portfolios which could be tied with the stronger brands (for example,

Innocent smoothies or Coca-Cola). Thus there is no change brought about by the merger for these smaller brands. It has been put to the OFT that the merger may give TCCC the opportunity to tie sales of Innocent products to its core CSD brands.

72. However, there is limited evidence that TCCC would have the incentive to do so. Most retailers that are likely to sell large volumes of smoothies already stock Innocent and, according to retailers, the alternatives to Innocent include the retailers' own label products and other 100 per cent juices. The OFT does not consider that these are credible foreclosure targets.
73. Many of the customers that currently buy TCCC products but not those of Fresh Trading were not interested in selling smoothies, and attempting to foreclose access to these retailers would not affect rival brands that were not stocked by them. Any retailers that had significant sales of rival smoothie brands or private labels were very reluctant to change their range against customer wishes. No customers considered this a likely impact of the Transaction.
74. Overall, there is little incentive to bundle the larger portfolio that TCCC will obtain from the Transaction. There are few retailers with significant volumes of competing products that would consider switching to Innocent. Furthermore, any attempt to influence retailers' decisions in this way is likely to have a significant impact on the support major retailers give to the brands of TCCC compared to those of competitors.

#### **Effect of foreclosure**

75. It is not necessary to look at effect in this case because the OFT does not consider that the merged firm has either the ability or incentive to foreclose. Further, the OFT considers that the merger would not bring about a significant change in either of these conditions. It can be noted, however, that there are several significant retailers (including the largest five grocery chains) which can individually access large numbers of consumers, and so even if one retail channel was foreclosed there would be several other distribution options for attracting consumers to a new brand.

### **Conclusion on portfolio effects**

76. Overall the OFT has found that the current situation, with no evidence of any leveraging of the portfolio or bundling, would be unlikely to be changed (either from ability or incentive) due to the Transaction. The presence of strong rival portfolios will continue to ensure that in each product segment variety is provided in line with consumer tastes and retailer strategies (including private labels).

### **Barriers to entry and expansion**

77. The parties submitted that barriers to entry are relatively low, noting that PepsiCo, Don Simon and Happy Monkey have all increased their share of the smoothies segment. The parties referenced Fresh Trading's entry with a capital of £[ ], noting that the production of smoothies can be outsourced to third parties, allowing both new entrants and existing beverage players to launch products without having to invest in manufacturing capacity.
78. However, third parties did not consider that these markets were easy to enter. The main barrier to entry was considered the building and investment behind a new brand that would have to find space on supermarket shelves. No third party said that they were aware of significant entry planned into these markets (particularly smoothies) in the near future. However, there are some initial signs that smaller smoothie firms can grow their share, with some 2012 data pointing to a small rise in branded competitors to Innocent. The majority of smoothie competitors did not raise concerns about the merger.
79. The overall available evidence on entry is mixed. However, given the outcome of the OFT's assessment, the OFT has not found it necessary to conclude on whether barriers to entry and expansion to the supply of beverages in any of the relevant drink categories are high.

### **Countervailing buyer power**

80. The parties told the OFT that major UK grocery retailers have significant buyer power, and have strong incentives to facilitate and promote competition among rival brands by switching opportunistically between suppliers. The parties also submitted that major wholesalers and larger

chains have buyer power and could or have introduced own brand products.

81. Third party views on buyer power have been mixed, with some large retailers claiming that it is difficult to negotiate and gain discounts from CCE (and they would prefer to deal with Fresh Trading). Others said that they have private labels to switch to and/or strategic products which they could support or withdraw support from. There are a wide range of different customers including many smaller customers who may not buy directly from CCE, but could for instance, rent a chiller from them. It appears that not all customers will have buyer power, but given the conclusions elsewhere it has not been necessary to conclude in this case.

### **THIRD PARTY VIEWS**

82. During the course of the investigation the OFT received comments and evidence from a wide range of third parties including major supermarket operators, foodservice companies, small independent retailers, retailers operating in the on-trade channel, wholesalers and competitors. Some of these retailers had a Coca-Cola chiller from which they sell TCCC products while others did not.
83. The large majority of the third parties were not concerned about the Transaction. Where third parties did raise concerns they have been discussed above.
84. Some customers which stocked smoothies did not consider them to be an important component of their sales and were not concerned about the Transaction. Others said that Innocent is a must stock brand but did not consider that they would face pressure to change their buying habits after the Transaction.

### **ASSESSMENT**

85. The parties to the Transaction manufacture and supply a range of soft drinks and overlap in the broad category of the supply of still drinks (which includes enhanced waters), fruit juices and nectars. However, on a narrower description of the products the parties do not overlap in the supply of smoothies. Moreover, there is no overlap in the supply of CSDs.

86. The OFT has not found it necessary to conclude on market definition in this case but rather has assessed the effect of the Transaction on both narrow and broad product descriptions in the UK. In its assessment the OFT has used product descriptions of still drinks, enhanced waters, children's single serve fruit drinks, smoothies and CSDs.
87. The OFT does not consider that the Transaction raises a realistic prospect of a substantial lessening of competition with regard to horizontal unilateral effects. The OFT did not receive evidence showing that the Oasis and This Water brands are close competitors. Indeed, the evidence considered by the OFT indicates that a fall in sales of Oasis does not translate into a higher level of sales of This Water. This was corroborated by internal documents which show that the products are aimed at different customer categories. Nor did the OFT receive evidence showing that Glaceau Vitamin Water competes with This Water.
88. In terms of conglomerate concerns, the OFT did not find any evidence that some retailers' use of 'category captains' would allow TCCC to strengthen any ability to harm rivals as a result of the Transaction. Likewise, although some third parties raised concerns that TCCC may be able to influence retailers' stocking decisions by restricting the conditions of use of its chiller cabinets, the OFT considered this to be unrealistic. No third parties were able to demonstrate that CCE chillers are currently used for non-CCE smoothies or 100 per cent juices and no compelling evidence was presented to the OFT as to how the Transaction would harm rivals, and thereby consumers, via the use of CCE chillers.
89. Some third parties were concerned that after the Transaction CCE would leverage its strong position in the supply of CSDs and/or Fresh Trading's strong position in smoothies to foreclose rivals with the result that competition would be substantially lessened. However, the OFT does not consider that the Transaction would materially strengthen TCCC's position in the marketplace in relation to the retailers and there is no compelling evidence that TCCC would have the ability to undertake such a bundling or tying strategy. Indeed, TCCC currently has a number of brands which retailers are not required to stock in return for being able to stock Coca-Cola branded products.

90. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

91. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.